COMMONWEALTH OF VIRGINIA

STATE CORPORATION COMMISSION

AT RICHMOND, MARCH 20, 2001

APPLICATION OF

B & J ENTERPRISES, L. C. CASE NO. PUE990616

For a certificate of public convenience and necessity to operate a sewerage utility

ORDER

On August 26, 1999, the Superintendent of B&J Enterprises, L.C. ("B&J" or "Company"), submitted an application and exhibits to the Commission's Division of Energy Regulation, requesting issuance of a certificate of public convenience and necessity to operate a sewerage utility, and the establishment of rates, terms and conditions for service. B&J provides service to customers in Blacksburg's Country Club Estates in Montgomery County, Virginia.

The Commission issued its Order Docketing Case and Suspending Rates on September 9, 1999. This Order permitted B&J to implement its proposed rates for service, other than its proposed connection fee, subject to refund pending the conclusion of the proceedings.

After receiving several protests from customers of the Company, the Commission issued its Procedural Order on February 15, 2000, setting the case for hearing and appointing a

Hearing Examiner to conduct further proceedings. The Hearing Examiner, by ruling issued March 10, 2000, set the case for public hearing in Blacksburg, Virginia on June 6, 2000. By subsequent ruling, the hearing was continued to July 31, 2000.

On the appointed date the case was heard. The Company produced two witnesses, Daina Trimble Reynolds, the Superintendent of the utility, and Burnice C. Dooley, an accounting consultant from Richmond. Staff offered testimony from Marc A. Tufaro of the Division of Energy Regulation and Ashley W. Armistead of the Division of Public Utility Accounting. Protestant Joan G. Moore testified in her own behalf. Additionally, testimony was received from a total of five public witnesses.

On December 20, 2000, Hearing Examiner Michael D. Thomas issued his Report herein. In the Report, Mr. Thomas found that:

> (1) The Company should be issued a [certificate of public convenience and necessity ("CPCN")] to operate a sewage utility in the Blacksburg Country Club Estates, Montgomery County, Virginia;
>
> (2) The Company's adjusted total revenue requirement of $71,760 is reasonable;
>
> (3) The Company should be permitted to include $23,259 in capitalized interest in its rate base;
>
> (4) The Company should include $110,000 in connection fees collected since it assumed operations of the sewage utility in rate base as a [contribution in aid of

construction ("CIAC")], as set forth in Hearing Examiner's Statement 1 attached [to the Report];

(5) The Company should not be permitted to use $30,000 in sewer connection fees collected from its customers to pay off the outstanding construction loan for the Greenbriar Circle development;

(6) The Commission has the jurisdiction to review the sales contract entered into between the Company and Blacksburg Country Club, Inc., to determine the Company's proper rate base for ratemaking purposes;

(7) The Company should include $210,605 in rate base as a CIAC to recognize the value of the undeveloped lots it received as consideration in the sales contract to extend the sewer collection system to all lots that were individually owned, but not yet served by sanitary sewer, as set forth in Hearing Examiner's Statement I attached [to the Report];

(8) The Company's requested management fee of $24,000 and accounting fee of $4,000 are reasonable;

(9) The $1,080 in organizational expenses for [Country Club Waste Water Systems, L.L.C. ("CCWWS")] should be included in rate base and capitalized;

(10) The Commission should require the Company to file an application within 90 days after the final order in this case to transfer its CPCN to CCWWS;

(11) The Company should be permitted a period of 90 days from the date of the Commission's final order in this case to convert its accounting records to the Uniform System of Accounts for Class "C" wastewater utilities;

(12) The Company should be permitted to charge a $2,500 one-time capital contribution on each of the 73 lots that were individually owned at the time the sales contract was entered to recover the cost of installing sewer laterals to serve these lots, and account for this contribution as CIAC;

(13) The Company should be permitted to charge a $5,000 one-time capital contribution on each of the 36 developable lots it acquired in the real estate sales contract to recover the cost of installing sewer mains and laterals to serve these lots, and account for this contribution as CIAC;

(14) The Company should be required to make the appropriate refunds, or additional CIAC assessments, as the case may warrant for sewer connection fees collected after the date of the Commission's order docketing this case and suspending the Company's proposed $17,500 sewer connection fee;

(15) The Company should be required to deposit all capital contributions or CIAC collected after the date of the Commission's final order in this case into a separate interest bearing account to be used solely for future capital improvements to the sewage utility;

(16) The Company should be required to use all capital contributions or CIAC collected prior to the date of the Commission's final order in this case solely to retire the debt associated with the sewer utility;

(17) The Company's $34 per month residential rate and $20 per month availability rate are reasonable;

(18) The Commission should impute $136 per month in revenues to the Company in calculating its revenue requirement for

agreeing to provide free sewage service to the Blacksburg Country Club;

(19) The Company's proposed $20 bad check charge and 1 1/2 percent per month late payment fee are reasonable;

(20) The Company's proposed $25 turn-on charge to restore sewage service after a discontinuation of service is reasonable;

(21) The Company failed to justify the need for its proposed disconnection and reconnection fees, therefore, the Commission should deny these fees;

(22) The Company's sewer main extension policy in its tariff should be approved;

(23) The Commission does not have the authority to require the Company to obtain prior approval of every capital expenditure in excess of $5,000;

(24) The Company should be permitted to acquire a wheeled generator to provide backup electrical power for its sewage pumping stations; and

(25) The Commission should address the issues related to the transfer of the assets of the sewage utility to CCWWS at the time the application for such transfer is filed with the Commission.

In accordance with his findings, the Hearing Examiner recommended that we enter an order adopting such findings and granting the Company a certificate of public convenience and necessity, and dismiss the case from the active docket. The Company and Staff filed separate comments on the Hearing Examiner's Report. The Staff's single comment takes exception

to the Examiner's inclusion of capitalized interest in the rate base; the Company likewise excepts, but takes the opposite tack, arguing that the Examiner included too little such interest in the rate base. The Company devoted much of the remainder of its 28 pages of comments and exceptions to various aspects of the sales contract under which it acquired this utility system. The Company contends, in essence, that the sales contract has no bearing on any of the issues in this case.

We disagree. Like the Hearing Examiner, we conclude that the Company received the system and substantial amounts of developed and developable real property as consideration for, in part, its extension of the system to unserved portions of the Country Club Estates development.

In choosing to enter this transaction, the Company undertook a calculated business risk that it could profitably develop and operate the sewer treatment system in conjunction with its other development activities. However, unlike the business of real property development, operation of a sewer utility is a public service function and subject, under the Code of Virginia, to regulation by the Commission and other agencies of the Commonwealth. When the Company acquired the system it knew, or should have known, that our approval of the rates and terms of the service it could offer its customers in Country Club Estates was needed.

As compiled in the findings and recommendations set out above, the Examiner has recommended that we approve certain monthly charges both for customers actually connected to the system and for those who own lots, but who have not yet built dwellings on them. This latter charge is known as an availability fee. The Examiner has further recommended that we approve certain levels of capital contributions from current and future lot owners in the development. The combination of fees and contributions is intended to defray the Company's current costs of operation and to provide funding for future capital expenditures for repairs and improvements that might become necessary over time.

We commend the Examiner for his diligence and the thoughtful consideration he has given this most unusual matter, including convening the public hearing in the locality to facilitate participation by affected customers, as well as the Company. However, we find we cannot implement certain of his recommendations and so will establish rates and charges that differ considerably from his recommendations.

First, the Commission has concluded earlier[1] that imposition of availability fees is permissible only "through contract or restrictive covenant in order that purchasers of property have

[1] See, Commonwealth of Virginia, ex rel. Frank Ott, et al. v. Wintergreen Valley Utility Company, L.P., 1998 S.C.C. Ann. Rep. 352, 354 (Final Order, April 27, 1998).

notice of such fees. Notice is required so that a prospective purchaser not be made a customer of the utility involuntarily." The record is devoid of evidence that indicates the existence of any contract clause in deeds of purchase or any restrictive covenant that would alert prospective purchasers of lots in Country Club Estates that the purchase of a lot comes with an obligation to support, through payment of an availability fee, the sewer utility. Accordingly, we cannot adopt or approve an availability fee for lots now individually owned but not yet built upon. If there is evidence not offered to the Examiner that could establish the requisite notification to prospective purchasers, we invite the Company to request rehearing for the purpose of adducing this proof.

Further, we can and will allow the Company to collect availability charges for those lots it now owns and will develop and sell to the public. The Company can provide the requisite notice, through the creation of a covenant that runs with the land, for example, in the conveyance instruments for these lots. If B&J chooses to implement an availability charge, while it retains ownership of the lots, we will impute to its revenues an amount equal to the fees it could collect upon sale of the lots to a properly notified customer.

Further, just as we cannot indenture or involuntarily obligate a person or business to become a customer of a utility,

we find we cannot obligate a person or business to become an investor of a utility involuntarily. Accordingly, we will not approve or adopt any level of "contribution to capital," as recommended by the Hearing Examiner upon customers of the Company who are currently receiving service. We believe that only taxing authorities possess the authority to obligate the payment of capital assessments, or their equivalent, by recipients of utility service.

Despite our inability to allow the above-discussed fees and charges, we do find that the Company has met its burden to prove its reasonable operating expenses. Under the Small Water or Sewer Public Utility Act,[2] we must establish "reasonable and just" charges for B&J to enable it to recover the costs of:

> 1. The operation of the system, including maintenance costs, operating charges, and interest charges on bonds or other obligations;
>
> 2. The providing for the liquidation of bonds or other evidence of indebted-ness and the attraction of capital;
>
> 3. The providing of adequate funds to be used as working capital, as well as reasonable reserves and funds for making replacements, which may be escrowed and used only as working capital if the Commission so directs as a result of a proceeding conducted pursuant to § 56-265.13:6;

[2] Section 56-265.13:1 et seq. of the Code of Virginia.

> 4. The providing for the payment of taxes that may be assessed against the small water or sewer utility or its property; and
>
> 5. Compensation of owners of the utility for their capital or property invested in the system, if any, and for their time and other resources expended in the operation of the system, not otherwise recovered under subdivisions 1 through 4 of this section.[3]

In this case, B&J has demonstrated operating and maintenance, depreciation, and tax expenses of approximately $59,000, as set out on Statement I attached to the Hearing Examiner's Report. In order to permit the Company the opportunity to recover its legitimate expenses, we find we must establish a monthly rate of $40, which exceeds the rate noticed to the public in this proceeding. However, as the public was also provided notice that the Company intended to charge availability fees, which we will not permit, and a fee for connection in excess of the level we permit below, we find no impediment in the notice to establishing appropriately compensatory rates for monthly sewer service.

The Company requested, and noticed to the public, a connection fee of $17,500 and a re-connection fee of $5,000. We preliminarily found these fees to be out of line with the cost-based fees for connection and re-connection charged by other similar utilities. By our order of September 9, 1999, we

[3] Section 56-265.13:4 of the Code of Virginia.

prohibited the Company from imposing its connection fee in the amount sought and suspended its imposition of the re-connection fee for a period of 150 days, the maximum suspension permitted by statute. In that order we cautioned the Company that if it chose to impose either the connection fee (in the permitted amount of $3,500) or the re-connection fee that both were subject to refund, "should investigation reveal either to be above the Company's just and reasonable cost of service."

At hearing it was revealed that the actual cost of connection was minimal, owing to the manner in which the Company had installed its mains and service laterals, which exceeded its obligations under the sales contract. Consequently, the Company has incurred costs for the installation of its system that it ought to and will be permitted an opportunity to recover. We will permit B&J to assess a $5,000 connection fee, effective on and after the date of this order,[4] upon all lots that were conveyed to it in the sales contract between it and Blacksburg Country Club and that are not now connected to the system. The Company will escrow these fees, in an account to be used as a fund for making replacements and system improvements only.

[4] The Company may not recover from any customer that has paid a lesser connection fee any difference between the fee so collected and the fee we now find appropriate on an on-going basis. Neither is the Company required to refund any connection fee it collected prior to our Order of September 9, 1999, in this matter.

We accept the remaining recommendations of the Examiner with regard to the miscellaneous charges of the Company and its terms and conditions of service. We will grant it a certificate of public convenience and necessity to provide sewer service in the Country Club Estates, Montgomery County, Virginia.

Accordingly, IT IS ORDERED THAT:

(1) The Company shall be granted Certificate No. S-85, to provide sewer service in the Country Club Estates, Montgomery County, Virginia.

(2) The Company may assess a monthly charge of $40 for sewer service.

(3) The requested availability fee is denied, except for those lots now owned by the Company and for which it can develop appropriate legal instruments to notify potential purchasers of the existence of an availability fee, in which case the fee shall be $20 per month.

(4) The Company may assess a one-time connection fee of $5,000 for connection of service, on and after the date of this Order, to the lots conveyed to it in the sales contract referenced in the record. Otherwise, its proposed connection and re-connection fees are denied.

(5) The remaining charges, fees, and terms and conditions of service recommended by the Hearing Examiner are adopted.

(6) To the extent that B&J has, during the period in which its interim rates were in effect (September 9, 1999, through the date of this Order), collected any connection or re-connection charge that exceeds the charges permitted herein, it shall make refund of the excess to any affected customer on or before September 1, 2001.

(7) If B&J has, during the period in which its interim rates were in effect (September 9, 1999, through the date of this Order), collected any connection or re-connection charge for any lot other than the ones upon which such charges are permitted by this order, it shall make refund of such fee to any affected customer on or before September 1, 2001.

(8) B&J shall refund any availability fee collected by it subsequent to January 30, 2000, the end of the suspension period herein, to any affected customer on or before September 1, 2001.

(9) On or before May 1, 2001, B&J shall file tariffs with the Commission's Division of Energy Regulation that reflect the rates, charges, fees, and terms and conditions of service approved herein.

(10) On or before October 30, 2001, B&J shall deliver to the Division of Energy Regulation a report detailing its compliance with the refund provisions of this Order. The Company shall bear the cost of making any necessary refund.

(11) This matter is dismissed.